Barron Heating & Air Conditioning, Inc. *and* Sheet Metal Workers, Local 66, affiliated with Sheet Metal Workers International Association, AFL–CIO. Case 19–RC–14429

October 29, 2004

DECISION ON REVIEW AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On November 5, 2003, the Regional Director for Region 19 issued a Decision and Direction of Election in the above-entitled proceeding in which he found that a combined unit of sheet metal employees employed in the Employer's commercial, residential, and service departments was not appropriate. Instead, the Regional Director found two separate units to be appropriate; one comprised of all sheet metal employees employed in the Employer's commercial department and the other comprised of all sheet metal employees employed in the Employer's residential and service departments.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review, contending that its petitioned-for unit of all employees performing sheet metal work in the Employer's commercial, residential, and service departments was an appropriate unit for collective bargaining.

By Order dated February 19, 2004, the Board granted the Petitioner's request for review. The election was conducted as scheduled on February 11, 2004, and the ballots were impounded. The Petitioner and the Employer filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this proceeding, including the briefs on review, we conclude, contrary to the Regional Director, that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[1]

Facts

The Employer is a heating, ventilation, and air conditioning (HVAC) contractor with offices and facilities located in Bellingham and Burlington, Washington.[2] The Employer also sells and installs wood and gas stoves, fireplaces, spas, and accessories.

The Employer employs a total of 95 employees who are divided into six departments: commercial, residential, service, spa, hydronics, and fireplace. The sheet metal employees, whom the Petitioner seeks to represent, are employed in the commercial,[3] residential, and service departments.[4] All sheet metal work is performed out of the Employer's Bellingham shop facility, and the work is primarily performed in the northwest portion of Washington State. There are approximately 33 employees in the petitioned-for unit.

Bill Pinkey and John Barron co-own the company. Pinkey is the chief financial officer and oversees the commercial department, administrative personnel, and warehouse operations. Barron is the chief executive officer and general manager and oversees the balance of the operations, including the residential and service departments.

The parties have a lengthy collective-bargaining history governed by Section 8(f) of the Act. The Employer was formed in approximately 1973 and about that time it signed a master labor agreement with the Petitioner's predecessor labor organization. The initial labor agreement (the Standard Form), covered all sheet metal employees employed by the Employer, regardless of whether those employees were performing commercial, residential, or service work. Over time, three addenda to that agreement were adopted which carved out from the master labor agreement certain terms and conditions applicable to commercial, residential, and service employees, respectively.

Apart from the addenda, the master agreement continued to cover all three groups on such subject matters as union security, grievance and arbitration, and other general items. The addenda generally contained the respective economic packages (wages, benefits, etc.) for the three groups of employees. The addenda also provided specific scope of work descriptions for the employees,

[1] The Employer contends that new evidence establishes that its current agreement with the Petitioner concerning the Employer's commercial department employees was converted from an agreement governed by Sec. 8(f) of the Act to one governed by Sec. 9(a) of the Act and therefore, the two separate units found appropriate by the Regional Director are now inherently appropriate. In response, the Petitioner contends that the Employer is trying to take advantage of an administrative mistake by the Petitioner. We find, however, that this post-petition conduct has no bearing on the appropriateness of the petitioned-for unit. Therefore, the Employer's motion to reopen the record is denied. See Sec. 102.65(e)(1) of the Board's Rules and Regulations.

[2] The Employer maintains a showroom in Burlington for spas and gas and wood stoves. The employees employed at the Burlington showroom are not involved in this proceeding.

[3] The commercial department has historically been known as the building trades department.

[4] Both parties wish to exclude employees working in the spa, hyrdonics, and fireplace departments from any unit(s) found appropriate herein.

travel criteria, and other limited terms and conditions of work. Over the years, the parties entered into successive master labor agreements, with addenda.

The parties' practice of negotiating separate addenda for the commercial, residential, and service sheet metal employees ran until 2000, when the Employer did not renew the addendum for its service employees, thereby effectively ending the Petitioner's representation of the service employees at that time. In a letter dated May 20, 2003, the Employer notified the Petitioner that it would not renew the residential addendum following its expiration on May 31, 2003. Shortly thereafter, the Employer and the Petitioner signed just the master agreement and the commercial addendum, which covered only the sheet metal employees in the commercial department and which, by its terms, is effective from June 1, 2003 through May 31, 2006. The instant petition was filed in response to the Employer's refusal to renew the residential addendum.

Employees in the commercial (or building trades) department install HVAC equipment in commercial buildings. Project Managers Don Inman and Leroy Mans supervise the department.[5] They perform all the estimating for the department, work-up bids, submit bids and, if successful in the bidding process, manage projects. Inman and Mans report directly to Bill Pinkey. The department obtains almost all of its work through a bidding process. It employs no sales people. At the time of the hearing, the commercial department employed seven employees, which include a journeyman fabricator and an apprentice fabricator who work in the Employer's Bellingham shop facility, four journeymen field mechanics, one apprentice field mechanic, and two service technicians.[6] Commercial department employees are hired through the Petitioner's hiring hall, and they must have either passed a 5-year State-approved apprenticeship program or possess 10 years of experience and have passed an exam administered by an industry joint examining committee. Commercial department employees are subject to the vagaries of new construction, which means that the Employer's staffing levels can vary. However, because commercial department employees are qualified to perform all of the HVAC sheet metal work performed by the Employer, during a down turn in the commercial market, the Employer gives commercial department employees the opportunity to perform residential work.[7]

Employees in the residential department install HVAC equipment in private residences and individual apartment units. The residential department is supervised by Bryant Mattson.[8] Mattson reports directly to John Barron. The department obtains work through sales employees and dispatch employees.[9] There are 26 employees in the residential department: 2 residential shop/fabrication employees, 20 residential field installers, and 4 gas pipe installers.[10] Residential employees are typically hired "off the street" through various means. Residential department prospective employees can have extensive experience or have none prior to their hiring. In the latter case, new residential department hires are subject to on-the-job training. Under the residential addendum, new employees could become part of the Residential Trainee Program. Trainees were required to attend union-sponsored training which consisted of one 3-hour training class per week for 40 weeks. Upon completion of the program, trainees would appear before the New Review Board who would determine whether they were qualified to assume journeymen status. The record is unclear as to how many of the Employer's residential employees were enrolled in the Residential Trainee Program; however, the parties did stipulate that enrollment in the program was not mandatory for the Employer's new residential trainees. If a trainee is not officially enrolled in the Residential Trainee Program, then the Employer determines when the trainee is qualified for residential journeyman status based on his or her other performance and attendance at various training classes. All residential employees are officially dispatched through the Petitioner's hiring hall. The residential department has relatively steady employment with little or no fluctuation in the number of employees employed by the Employer.

Service technicians repair and maintain equipment at both commercial and residential locations. George Mosier supervises the service department;[11] he reports directly to John Barron. The department is composed of

[5] The parties stipulated that Inman and Mans are supervisors within the meaning of Sec. 2(11) of the Act.

[6] The two service technicians assigned to the commercial department work autonomously from the service department technicians, performing commercial installation tasks and setting up control systems and monitoring those systems.

[7] Under the current 8(f) agreement a commercial department employee can perform residential work as long as the employee agrees in writing.

[8] The parties stipulated that Mattson is a supervisor within the meaning of Sec. 2(11) of the Act.

[9] Neither party seeks to include the salespeople or dispatchers in any unit(s) found appropriate herein.

[10] The Petitioner is not seeking to represent the gas pipe installers, and the Employer is not contending they should be part of any unit. The Petitioner and its predecessor has not historically represented gas pipe installers.

[11] The parties stipulated that Mosier is a supervisor within the meaning of Sec. 2(11) of the Act.

two dispatchers, one clerical,[12] and eight service technicians. The department obtains work through sales employees and dispatch employees. The service workers are hired by the Employer and generally have some outside training from a technical school, which takes 1 to 2 years to complete. All service employees are officially dispatched out of the Petitioner's hiring hall. The service department has relatively steady employment with little or no fluctuation in the number of employees employed by the Employer.

While commercial work is inherently more complex, commercial and residential employees perform essentially the same functions. Both groups of employees install ductwork, fittings, and equipment such as furnaces, heat pumps, and air conditioners. Both groups use the same basic tools, with commercial installers using some larger tools to account for thicker ducting.

Commercial installers routinely work on both commercial and residential jobs. When working on residential jobs, they work alongside residential employees and perform the same work. Similarly, in an effort to allow more qualified residential installers to perform commercial work, the Petitioner recently gave four residential installers upgrades to journeyman building trades classification. All of these individuals had completed at least 10 years in the industry as sheet metal workers and were tested after nearly a year of attending classroom instruction. Under the residential addendum, these employees were classified as master residential mechanics and they have the ability to work on both commercial and residential jobs. To provide experience to these employees who were upgraded to building trades journeyman status but lacked the skills to work on the most complex commercial project, the parties established a new scope of work under the 2000–2003 Agreement entitled "light commercial." This work operated to bridge the Employer's more experienced residential employees to commercial department work. The program allows for the reciprocal migration of residential employees into commercial work.[13] Indeed, when asked at the hearing what scope of work he had performed over the past 6 months, Fred Nelson, who upgraded to journeyman building trades classification, testified that he has performed commercial, residential, and light commercial work in the field, and both commercial and residential fabrication in the shop.

[12] The Petitioner is not seeking to represent the dispatchers or the service clerical, and the Employer does not contend that they should be part of any unit.

[13] Building trades mechanics with a minimum of 2 years of continuous employment have priority to work light commercial jobs at building trades rates if commercial department work is not available.

The shop fabricators for both residential and commercial departments work side-by-side in the Employer's Bellingham facility. They work on the same equipment and fabricate the same product. Both use hand and power equipment, such as shears, plasma cutters, and brakes, and both fabricate fittings and ductwork. Regardless of their official classification, employees perform both commercial and residential fabrication.

While it is clear that commercial department employees earn higher wages than residential and service department employees, the record is unclear as to the current wage rates of each group of employees. Nevertheless, all employees in the petitioned-for unit are subject to the same general terms and conditions of employment.

Analysis

In determining an appropriate bargaining unit the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. It is well settled that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be *an* appropriate unit. *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. *Bartlett Collins Co.*, 334 NLRB 484 (2001).

The Regional Director determined that the commercial department employees do not share a community of interest with the residential and service department employees. The Regional Director, therefore, directed an election in a unit of commercial department employees. The Regional Director then determined that the residential and service department employees do share a community of interest. Accordingly, the Regional Director directed an election in a unit of residential and service department employees.

The Petitioner contends that the Regional Director erred because he did not consider, in the first instance, whether the petitioned-for unit of commercial, residential, and service department sheet metal employees was *an* appropriate unit. The Employer argues that, in the context of a representation petition which seeks to expand the scope of a unit covered by an 8(f) agreement, if the "contract unit" is an appropriate unit for collective-bargaining purposes, an election should be directed in that unit, rather than in a more comprehensive unit

sought by the petitioning union, even though the expanded petitioned-for unit may also be appropriate. In other words, according to the Employer, the question for determination by the Board is whether the 8(f) "contract unit" is appropriate, not whether the petitioned-for unit is an appropriate unit. Since only commercial department employees are covered by the current 8(f) contract, the Employer argues that the Board should limit its inquiry into whether a unit consisting of sheet metal employees employed in the Employer's commercial department is an appropriate unit. The Employer relies on the Board's decision in *John Deklewa & Sons*,[14] where the Board said that 8(f) agreements "will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e)" and "in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement."

While it is clear that bargaining history is a factor to be weighed and considered in determining whether a petitioned-for unit is appropriate,[15] we reject the Employer's reading of *Deklewa*. In *Deklewa* the Board announced new rules to apply to 8(f) agreements; the Board, however, did not jettison its long-standing procedure that, in determining the appropriate unit under Section 9(b), it will first examine the petitioned-for unit.

The very language that the Board used in *Deklewa*, "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added), clearly conveys that the 8(f) contractual unit is not necessarily conclusive as to the determination of the appropriate unit.[16] See *Alley Drywall, Inc.*, 333 NLRB 1005, 1007 (2001) ("Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate."); *Dezcon, Inc.*, 295 NLRB 109, 112 (1989) ("The Board's remarks on unit scope in *Deklewa* should not be interpreted so as to rob construction industry employees of meaningful choice, simply because an employer has unilaterally decided to limit its relations with craft unions . . .")[17]

We now proceed to make the relevant inquiry: whether the petitioned-for unit is *an* appropriate bargaining unit. The touchstone for determining whether a bargaining unit is appropriate is a community of interest analysis. The Board determines whether the employees in the petitioned-for unit share a sufficient community of interest in view of their duties, functions, supervision, and other terms and conditions of employment. *Johnson Controls, Inc.*, 322 NLRB 669, 670 (1996), *P.J. Dick Contracting, Inc.*, supra. Upon review of the record, we find that the petitioned-for unit of all of the Employer's sheet metal employees is an appropriate unit for collective bargaining as the employees share a sufficient community of interest to constitute an appropriate overall single unit: HVAC sheet metal employees employed by the Employer perform nearly identical processes, using the same tools and skills, with interchange of duties in an integrated environment.

First, all the employees at issue are based at the Employer's facility in Bellingham, Washington, and all employees are subject to the same general terms and conditions of employment. More importantly, all the employees perform essentially the same type of work: installation, service, and repair of HVAC equipment in commercial and residential buildings. While commercial installation projects are more complex than residential installation projects, the requisite skills and functions required for commercial and residential fieldwork are similar. Both commercial and residential field employees install ductwork, fittings, and equipment such as furnaces, heat pumps, and air conditioners. Commercial and residential installers use the same basic tools, with commercial installers using tools that may be a little larger to account for thicker ducting.[18] Installers for both groups drive the same vans.

Both residential shop employees and commercial shop employees work on the same equipment to fabricate the same product. Both use hand and power equipment, such as shears, plasma cutters, and brakes, and both fabricate fittings and ductwork. While fabricating, residential and commercial employees work side-by-side in the Employer's shop and the residential employees perform commercial fabrication and vice versa.

The service department employees are functionally integrated with both the commercial and residential departments. They follow the other two departments, in the

[14] 282 NLRB 1375, 1377 (1987) enfd. 843 F.2d 770 (3d Cir. 1988).

[15] The Board's decision in *P.J. Dick Contracting, Inc.*, supra, makes it clear that, while 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive. In finding the historical unit to be appropriate, the Board did not find that its decision in *Deklewa* compelled a finding that only the historical unit was appropriate. Rather, the Board made it clear that the broader unit sought by the petitioner might be appropriate; however, the Board found that the petitioner had failed to present any evidence to demonstrate its appropriateness. *P.J. Dick Contracting, Inc.* supra at fn. 8.

[16] 282 NLRB at 1377.

[17] See also *RC Aluminum v. NLRB*, 326 F.3d 235, 241 (D.C. Cir. 2003) (community of interest factors can outweigh construction industry bargaining history).

[18] Fred Nelson, who transferred to the commercial department after being hired in the residential department, testified that there are very few differences in duties and skills between commercial, light commercial, and residential work. While noting that commercial work, due to its larger scale, has different hangers and larger ductwork of higher gauge steel, he testified that the process of installing both is the same.

same vans with the same equipment, in performing service and maintenance on both commercial and residential projects. Service department employees perform the same tasks, regardless of whether they are dispatched to commercial or residential jobs.

The record further demonstrates that regardless of how the Employer's sheet metal employees are hired, they can progress within the company, and have the opportunity for different job assignments. Currently, three of the seven commercial department employees, excluding supervisors and service employees, have residential backgrounds and were not hired as commercial department employees through the Petitioner's hiring hall. For example, employee Tim Zender was hired as a residential employee; however, when a building trades apprentice position became available, he transferred to the commercial department. He is currently enrolled in the apprenticeship program and serves as a building trades apprentice.

Moreover, both commercial and residential employees routinely perform work in both departments. Commercial department employees perform residential work. When they do, they work side-by-side with residential employees performing the same work. Additionally, both residential and commercial department employees perform "light commercial" work. By creating the "light commercial" program in 2000, the parties contractually bridged the gap between commercial and residential employees to reflect the reality that the more experienced residential employees possessed the requisite skills to perform commercial work.

Finally, the inherent community of interest shared by the petitioned-for employees is reflected in the parties' 20-to-30 year bargaining history, prior to the Employer's recent refusals to renew the service and residential addenda. Beginning in 1973 the commercial, residential, and service workers were organized into one unit, with separate addenda later negotiated to cover specific issues related to each group. All three groups continued to be subject to the general terms of the master labor agreement. While the Employer and Petitioner are currently signatories to an 8(f) agreement covering only the Employer's commercial department employees, this current limited 8(f) relationship is not sufficient to preclude a finding that the unit sought by the Petitioner is appropriate.[19] To the extent bargaining history is considered, it weighs more heavily in favor of finding a single overall unit of sheet metal employees appropriate.

This case is similar to a prior case in which the Board found that similarly situated employees constitute an appropriate unit, as petitioned-for by the union. In *Johnson Controls, Inc.*,[20] the employer installed, serviced and repaired HVAC equipment in buildings. The union petitioned for an overall unit of employees involved in installing, servicing, and repairing the HVAC systems. The petitioned-for unit included fitters, system representatives, preventive maintenance inspectors, and service specialists. The employer argued that the only appropriate unit would consist of all the employer's employees, excluding the fitters, supervisors and clericals. The Board found that, despite 8(f) bargaining history in which the fitters were organized as a single unit, the petitioned-for employees shared a community of interest sufficient to constitute an appropriate unit.

We recognize that the record and the Regional Director's decision suggest that if the Petitioner sought separate units, those units would probably be appropriate. The Petitioner does not, however, seek separate units. The only question before us is whether the petitioned-for single overall unit of HVAC sheet metal employees employed at Employer's Bellingham facility is an appropriate unit. After careful review of the entire record in this proceeding, we believe that it is.

Accordingly, we conclude that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. We reverse the Regional Director's finding and remand this case to the Regional Director for further appropriate action.

ORDER

The Regional Director's Decision and Direction of Election is reversed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Order.

Dated, Washington, D.C. October 29, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[19] See *Dezcon, Inc.*, supra at 112.

[20] 322 NLRB 669 (1996).